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No. 83-2115

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED PARCEL SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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8 pp

TABLE OF AUTHORITIES

Page

Cases:

Fogel v. *Chestnutt*, 668 F.2d 100, cert. denied, 459 U.S. 828 4

Handi Investment Co. v. *Mobil Oil Corp.*, 653 F.2d 391 4

NLRB v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983) 3

Olin Corp., 268 N.L.R.B. No. 86 (Jan. 19, 1984) 3, 4

Petition of United States Steel Corp., 479 F.2d 489, cert. denied, 414 U.S. 859 4

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 5

Zdanok v. *Glidden Co.*, 327 F.2d 944, cert. denied, 377 U.S. 934 4

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2

§ 8(a)(3), 29 U.S.C. 158(a)(3) 2

§ 8(a)(4), 29 U.S.C. 158(a)(4) 2

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Petitioner contends that the court of appeals erred in upholding the Board's refusal in this case to defer to grievance determinations under a collective bargaining agreement.

1. Petitioner discharged two of its employees, Robert Bowlds and David Perkins, in 1978 and 1979 respectively, allegedly because they had overextended breaks and falsified time cards. Prior to their discharges Bowlds and Perkins had engaged in various protected concerted activities. Following their discharges both men filed grievances pursuant to the applicable collective bargaining agreement. Grievance panels eventually upheld Bowlds' discharge and ordered Perkins' reinstatement without back pay. Pet. App. A5-A10.

Bowlds and Perkins also filed unfair labor practice charges with the Board alleging that they had been discharged for engaging in activities protected by the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The Board concluded, inter alia, that petitioner had violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4), by discharging Bowlds and Perkins because they had engaged in protected concerted and union activities (Pet. App. A35-A79). The Board declined to defer to the decisions of the grievance panels that had sustained Bowlds' discharge and ordered Perkins reinstated without backpay. The Board found that neither the issue of whether Bowlds' and Perkins' discharges were the result of their protected activities nor evidence relating to that issue had been presented to the grievance panels.[1]

In April 1983, the court of appeals affirmed the Board's refusal to defer to the decisions of the grievance panels (Pet. App. A4-A34). The court agreed with the Board that "no evidence of Bowlds' and Perkins' protected activities was

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[1]In findings affirmed by the Board, the Administrative Law Judge explained (Pet. App. A65):

> [T]he concerted activities and union activities of Perkins and Bowlds were not brought up at any of the grievance joint meetings except in making a brief mention by reading references to such as part of the grievance language. Moreover, Union Agent Trenaman admitted that he never met with Bowlds or Perkins before the grievance joint panel meetings during the various steps of the grievance procedure, never went over their testimony with them, never introduced any evidence concerning their PROD or UPSurge activities, their class action lawsuit (other than a reference to it in Bowlds' grievance), nor the fact that they had filed grievances under the grievance procedure, nor that they had testified in the earlier Board case (25-CA10318). In the final analysis, the joint grievance committees and panels here involved did not consider the relevant facts pertaining to union and concerted activities of Bowlds and Perkins, in fact, were barely made aware of them.

presented at any stage of the grievance proceedings" (*id.* at A21). However, the court refused to sustain the Board's findings concerning the cause of Bowlds' and Perkins' discharges. The court concluded that the Board had misallocated the burden of proof on that issue and remanded so that the Board could apply an alternative burden of proof rule.

Both petitioner and the Board filed petitions for a writ of certiorari. Petitioner sought review of the court of appeals' ruling that the Board was not required to defer to the grievance decisions, and the Board sought review of the court's ruling on the burden of proof. The Court denied the Petition filed by the petitioner. *United Parcel Service, Inc.* v. *NLRB*, No. 83-71 (Nov. 7, 1983). The Court granted the Board's Petition, vacated the judgment of the court of appeals, and remanded to the court of appeals for further consideration in light of *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983). *NLRB* v. *United Parcel Service, Inc.*, No. 83-453 (Nov. 14, 1983).

On remand, the court of appeals vacated its prior judgment and entered a new judgment enforcing the Board's order in full (Pet. App. A2-A3). Petitioner then filed a petition for rehearing in which it urged the court of appeals to remand to the Board so that it could reconsider the deferral issue in light of *Olin Corp.*, 268 N.L.R.B. No. 86 (Jan. 19, 1984), in which the Board had modified its standards for deferral. The court of appeals denied the petition for rehearing (Pet. App. A1).

2. The instant Petition presents the same question that petitioner raised in its earlier Petition, No. 83-71 — whether the court of appeals properly upheld the Board's refusal to defer to the grievance decisions relating to the discharges of Bowlds and Perkins. Since this Court denied certiorari in No. 83-71, the court of appeals' April 1983 decision on the

deferral issue is the law of the case. In any event, that issue would not warrant review by this Court. Petitioner makes essentially the same points in the instant petition as it made in No. 83-71. In our Brief in Opposition in No. 83-71 we explained why those contentions are insufficient to support review by this Court in the circumstances of this case.

The only new question presented by the instant Petition is whether the court of appeals abused its discretion in declining to remand to the Board for reconsideration of its decision on deferral in light of the Board's intervening decision in *Olin Corp., supra.* In the circumstances of this case, it is clear that there was no such abuse of discretion. While an intervening decision sometimes warrants reconsideration of an issue decided in an earlier appeal, it is not sufficient that such a decision would enable a party to "make a more persuasive argument;" instead, the new decision must provide a basis for a " 'clear conviction of error.' " *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982) (quoting *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), cert. denied, 377 U.S. 934 (1964)). See also *Handi Investment Co.* v. *Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *Petition of United States Steel Corp.*, 479 F.2d 489, 494 (6th Cir.), cert. denied, 414 U.S. 859 (1973).

In *Olin Corp., supra*, the Board did not change its policy of refusing to defer to grievance arbitration determinations in cases in which the unfair labor practice issue had not been adequately considered; it held only that it "would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice" (268 N.L.R.B. No. 86, at 5 (footnote omitted)). In this case, however, both the Board and the court of appeals concluded that the facts concerning

Bowlds' and Perkins' protected activities were not presented to the grievance panels.[2] The court of appeals therefore did not abuse its discretion in declining to remand to the Board for reconsideration of the deferral issue in light of *Olin Corp.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[2]Petitioner's contention that the grievance panels did consider the same factual issues as the Board in this case (Pet. 18) is merely a challenge to the Board's finding of fact, upheld by the court of appeals. That contention does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Pages 3-6, 11-12, and 13-14 of our Brief in Opposition in No. 83-71 describe the relevant findings of the Board.

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